

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL JOSEPH PITKIN,

Plaintiff

v.

CHRISTOPHER ROCH PITKIN, et. al.,

Defendants

Case No.: 3:19-cv-00766-MMD-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF Nos. 1, 1-1, 1-2, 6, 7

This Report and Recommendation is made to the Honorable Miranda M. Du, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

Plaintiff has filed an application to proceed in forma pauperis (IFP) (ECF No. 1) and pro se complaint (ECF No. 1-1, 1-2). He subsequently filed a "motion for pro se and in forma pauperis" (ECF No. 6), and a motion for pro bono representation (ECF No. 7).

I. IFP APPLICATION

A person may be granted permission to proceed IFP if the person "submits an affidavit that includes a statement of all assets such [person] possesses [and] that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress." 28 U.S.C. § 1915(a)(1); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (stating that 28 U.S.C. § 1915 applies to all actions filed IFP, not just prisoner actions).

The Local Rules of Practice for the District of Nevada provide: "Any person who is unable to prepay the fees in a civil case may apply to the court for authority to proceed [IFP].

1 The application must be made on the form provided by the court and must include a financial
2 affidavit disclosing the applicant's income, assets, expenses, and liabilities." LSR 1-1.

3 "[T]he supporting affidavits [must] state the facts as to [the] affiant's poverty with some
4 particularity, definiteness and certainty." *U.S. v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981)
5 (quotation marks and citation omitted). A litigant need not "be absolutely destitute to enjoy the
6 benefits of the statute." *Adkins v. E.I. Du Pont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

7 A review of the application to proceed IFP reveals Plaintiff cannot pay the filing fee;
8 therefore, the application should be granted.

9 **II. SCREENING**

10 **A. Standard**

11 "[T]he court shall dismiss the case at any time if the court determines that-- (A) the
12 allegation of poverty is untrue; or (B) the action or appeal-- (i) is frivolous or malicious; (ii) fails
13 to state a claim upon which relief may be granted; or (iii) seeks monetary relief against a
14 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(A), (B)(i)-(iii).

15 Dismissal of a complaint for failure to state a claim upon which relief may be granted is
16 provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. § 1915(e)(2)(B)(ii)
17 tracks that language. As such, when reviewing the adequacy of a complaint under this statute, the
18 court applies the same standard as is applied under Rule 12(b)(6). *See e.g. Watison v. Carter*, 668
19 F.3d 1108, 1112 (9th Cir. 2012) ("The standard for determining whether a plaintiff has failed to
20 state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
21 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim."). Review under
22 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of America*,
23 232 F.3d 719, 723 (9th Cir. 2000) (citation omitted).

1 The court must accept as true the allegations, construe the pleadings in the light most
 2 favorable to the plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*,
 3 395 U.S. 411, 421 (1969) (citations omitted). Allegations in pro se complaints are "held to less
 4 stringent standards than formal pleadings drafted by lawyers[.]" *Hughes v. Rowe*, 449 U.S. 5, 9
 5 (1980) (internal quotation marks and citation omitted).

6 A complaint must contain more than a "formulaic recitation of the elements of a cause of
 7 action," it must contain factual allegations sufficient to "raise a right to relief above the
 8 speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "The pleading
 9 must contain something more ... than ... a statement of facts that merely creates a suspicion [of]
 10 a legally cognizable right of action." *Id.* (citation and quotation marks omitted). At a minimum, a
 11 plaintiff should include "enough facts to state a claim to relief that is plausible on its face." *Id.* at
 12 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

13 A dismissal should not be without leave to amend unless it is clear from the face of the
 14 complaint that the action is frivolous and could not be amended to state a federal claim, or the
 15 district court lacks subject matter jurisdiction over the action. *See Cato v. United States*, 70 F.3d
 16 1103, 1106 (9th Cir. 1995); *O'Loughlin v. Doe*, 920 F.2d 614, 616 (9th Cir. 1990).

17 **B. Plaintiff's Complaint**

18 Plaintiff sues his siblings and their attorneys, as well as Christopher Patterson, regional
 19 administrator for the Office of Housing and Urban Development (HUD), Julia Peek, the Deputy
 20 Administrator for the Nevada Division of Public and Behavioral Health. Plaintiff's complaint
 21 asks the federal court to intervene on his behalf in the probate matter involving his mother's and
 22 grandmother's estates/property, and also to appoint counsel to him in these matters in Idaho,
 23 Oregon and Nevada. He also mentions that federal mandates require that he report all financial

1 assets in order to qualify for federal benefit programs, which he says can potentially interrupt his
2 benefits and affects his HUD Section 8 federal housing and his medical care. Plaintiff asks the
3 court to intervene on his behalf and bring about a resolution of the estates and asset reporting
4 requirements.

5 Plaintiff does not state a claim upon which relief may be granted. The federal court does
6 not have jurisdiction over Plaintiff's mother's or grandmother's probate proceedings. Nor does the
7 court have the power to appoint Plaintiff an attorney in those proceedings. Plaintiff should seek
8 appointment of counsel in those proceedings, or continue in his efforts to secure private counsel
9 perhaps on a contingency fee basis. Plaintiff also fails to state a claim with respect to alleged
10 mandates requiring that he report his assets to qualify for federal benefits programs. Plaintiff
11 should contact the agencies under which benefits are provided if he has questions about reporting
12 requirements.

13 In sum, the court recommends that this action be dismissed with prejudice for failure to
14 state a claim upon which relief may be granted.

15 **III. RECOMMENDATION**

16 IT IS HEREBY RECOMMENDED that the District Judge enter an order:

17 (1) **GRANTING** Plaintiff's IFP application (ECF No. 1). Plaintiff is permitted to
18 maintain this action without prepaying the filing fee or giving security therefor. This
19 order granting IFP status does not extend to the issuance of subpoenas at government
20 expense.

21 (2) The complaint (ECF No. 1-1) should be **FILED**.
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1 (3) The action should be **DISMISSED WITH PREJUDICE** for failing to state a claim
2 upon which relief may be granted, and the other pending motions (ECF Nos. 6, 7) should
3 be **DENIED AS MOOT**.

4 The Plaintiff should be aware of the following:

5 1. That he may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
6 this Report and Recommendation within fourteen days of being served with a copy of the Report
7 and Recommendation. These objections should be titled “Objections to Magistrate Judge’s
8 Report and Recommendation” and should be accompanied by points and authorities for
9 consideration by the district judge.

10 2. That this Report and Recommendation is not an appealable order and that any notice of
11 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
12 until entry of judgment by the district court.

13 Dated: March 20, 2020.

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15 William G. Cobb
16 United States Magistrate Judge
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